

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

scda_20

DATE: 06/24/2016

TIME: 09:00:00 AM

DEPT: 31

JUDICIAL OFFICER PRESIDING: Michael P. Kenny

CLERK: Susan Lee

REPORTER/ERM: K. Greiner CSR# 3690

BAILIFF/COURT ATTENDANT: Larry Moorman

CASE NO: **JCCP 4758**

CASE INIT.DATE: 07/31/2013

CASE TITLE: **Delta Stewardship Council Cases**

CASE CATEGORY: Civil - Unlimited

EVENT ID/DOCUMENT ID: ,13740646

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: Alameda County Flood Control & Water Conservation District Zone 7, Antelope Valley-East Kern Water Agency, Westlands Water District, Mojave Water Agency, Santa Clara Valley Water District, State Water Contractors, San Luis & Delta-Mendota Water Authority, Metropolitan Water District of Southern California, San Bernardino Valley Municipal Water District

CAUSAL DOCUMENT/DATE FILED: Notice - Other State and Federal Water Contractor Petitioners' Joint Amended Notice of Motion and Joint Motion for Clarification of Court's May 18, 2016 Ruling; Memorandum of Points and Authorities, 06/02/2016

EVENT ID/DOCUMENT ID: ,13737891

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: Delta Stewardship Council

CAUSAL DOCUMENT/DATE FILED: Motion - Other for Clarification on Ruling on Submitted Matter, 06/01/2016

EVENT ID/DOCUMENT ID: ,13731808

EVENT TYPE: Motion - Other - Writ of Mandate

MOVING PARTY: City of Stockton

CAUSAL DOCUMENT/DATE FILED: Motion - Other of Clarification on Ruling, 05/31/2016

ASSOCIATED CASES: 34-2013-80001500-CU-WM-GDS, 34-2013-80001530-CU-WM-GDS, 34-2013-80001534-CU-WM-GDS

APPEARANCES

Daniel L. Siegel, Supervising Deputy Attorney General, and Sarah H. Sigman, counsel present for Respondent/Defendant Delta Stewardship Council.

The certified court reporter is requested by the Respondent/Defendant.

Daniel J. O'Hanlon, counsel present for Petitioners/Plaintiffs and Interveners San Luis & Delta-Mendota Water Authority and Westlands Water District (Case No. **34-2013-80001500**).

Andrea A. Matarazzo, counsel present for Petitioners/Plaintiffs Westlands Water District (Case No. **34-2013-80001500**).

Charity B. Schiller, counsel present for Petitioners/Plaintiffs and Interveners State Water Contractors, Alameda County Flood Control and Water Conservation District, Zone 7, and San Bernardino Valley Municipal Water District (Case No. **34-2013-80001530**).

Leland P. McElhaney, counsel present telephonically for Petitioner/Plaintiff and Interveners Mojave Water Agency and Antelope Valley-East Kern Water Agency (Case No. **34-2013-80001530**).

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Calendar No.

Robert C. Horton, Senior Deputy General Counsel, counsel present for Petitioner/Plaintiff and Intervener The Metropolitan Water District of Southern California (Case No. **34-2013-80001530**).

Stephan C. Volker, counsel present for Petitioners/Plaintiffs North Coast Rivers Alliance, Pacific Coast Federation of Fisherman's Associations, San Francisco Crab Boat Owners Association, and the Winnemem Wintu Tribe (Case No. **34-2013-80001534**).

E. Robert Wright, Senior Counsel, counsel present for Petitioner/Plaintiff Friends of the River (Case No. **CPF-13-513047**).

Michael B. Jackson, counsel present for Petitioners/Plaintiffs California Water Impact Network, California Sportfishing Protection Alliance, AquAlliance, and Restore the Delta (Case No. **CPF-13-513047**).

Special Appearance by E. Robert Wright for John Buse, counsel present for Petitioners/Plaintiffs Center for Biological Diversity and California Water Impact Network (Case No. **CPF-13-513047**).

Osha R. Meserve, counsel present for Petitioners/Plaintiffs Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Cindy Charles and Local Agencies of the North Delta (Case No. **CPF-13-513048**).

Thomas H. Keeling, counsel present for Petitioners/Plaintiffs Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., and Cindy Charles (Case No. **CPF-13-513048**).

Michael A. Brodsky, counsel present for Petitioner/Plaintiff Save the California Delta Alliance (Case No. **CPF-13-513049**).

Steven A. Herum, counsel present for Petitioner/Plaintiff City of Stockton (Case No. **39-2013-00298188-CU-WM-STK**).

NATURE OF PROCEEDINGS: MOTIONS FOR CLARIFICATION

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on the various motions for clarification, which are scheduled to be heard by the Court on Friday June 24, 2016 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

Should any party request oral argument, such argument will be limited to discussion of the following issue: Whether any party believes review of the EIR can or must proceed despite the Court's ruling that the Delta Plan must be set aside pending ordered revisions.

Any party desiring an official record of this proceeding shall make arrangements for reporting services with the Clerk of the Department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day of proceedings lasting more than one hour. (Local Rule 1.12(B) and Government Code § 68086.)

Payment is due at the time of the hearing.

The Court hereby issues this ruling in response to various motions for clarification concerning its May 18, 2016 Ruling on Submitted Matter. In ascertaining the Court's final ruling, the Ruling on Submitted Matter should be read in conjunction with this ruling on the Motions for Clarification. No further ruling will be issued on the merits.

Respondent's Motion for Clarification

The Court notes that, while presented as a motion for clarification, some of Respondent's arguments appear to re-argue issues already addressed in the briefing and the Court's ruling. To the extent that arguments address issues already decided, as opposed to requesting clarification, the Court will not address such arguments. The Court also notes that Respondent did not raise in its motion any request for clarification as to whether the Delta Plan must be set aside. This issue is discussed in response to the other two pending motions for clarification. Consequently, the Court notes at the outset that in light of the Court's finding of deficiencies in the Delta Plan, it is invalid and must be set aside until proper revisions are completed.

1. Respondent's first inquiry provides, "[t]he language calling upon the Council 'to revise the Delta Plan *and any applicable regulations*' to include measurable targets can be misinterpreted. (See Ruling, pp. 26 and 38 [emphasis added.]) This motion seeks clarification that the Court is not calling upon the Council to adopt, or revise, its performance measures *as regulations*. Moreover, the motion seeks clarification of the phrase 'and any applicable regulations.' "

In its ruling, the Court noted that section 85001 subdivision (c) directed the development of a "legally enforceable Delta Plan." The Court also found that the Delta Plan was deficient in several areas requiring measurable or otherwise quantifiable targets. Specifically, with regard to reduced Delta reliance, the Court found the Plan failed to include targets that would ensure reduced reliance, as required by the Delta Reform Act. None of the recommendations proffered by Respondent as complying with this requirement appeared to be designed to achieve measurable reduced Delta reliance.

In its opposition, Respondent argued that it adopted regulatory policies to establish compliance with this requirement. Respondent pointed to WR P2, and WR P1. The Court found these regulations did not require reduced reliance and did not set a goal or target for measurable reduced reliance. Consequently, these regulations were inadequate and failed to comply with the Delta Reform Act.

The Court noted in its ruling that,

"Section 85308 provides that the "Delta Plan *shall meet* all of the following requirements..." further bolstering a finding that the section provides a checklist for Delta Plan content. (emphasis added.) Accordingly, the Court performs its analysis of the Delta Plan with a view that a failure to include a section 85308 component is a failure to comply with section 85308, and a violation of the Delta Reform Act."

Section 85001 requires the Delta Plan to be "legally enforceable." As section 85308 is the lens through which the Court views the Delta Plan, and the Delta Plan is required to be legally enforceable, so must the section 85308 components. Accordingly, the Court reiterates that Respondent must revise the Delta Plan, and any applicable regulations to include quantified or otherwise measurable targets associated with achieving reduced Delta reliance, reduced environmental harm from invasive species, restoring more natural flows, and increased water supply reliability. Consequently, to achieve Delta Reform Act compliance with section 85308's requirements for quantifiable or otherwise measurable targets, Respondent must adopt legally enforceable regulations. Merely providing recommendations to comply

with section 85308 is insufficient.

Accordingly, the wording in the ruling, combined with this clarification is sufficient to convey the Court's intent that Respondent must comply with its obligation to create a legally enforceable Delta Plan that includes the section 85308 components.

2. Respondent's second inquiry provides, "[t]he language on page 38, lines 15-18, calling upon the Council to 'Provide a flow policy that includes 'quantified or otherwise measurable targets,' can be interpreted in one of two ways: As requiring a revised performance measure associated with flows, or as a [sic] requiring a revision of the Council's flow policy (regulation) itself. This motion seeks clarification that the Court is calling for a revised performance measure associated with flows, but not a revision of the Council's flow policy (regulation) itself."

The Court assumes Respondent is referring to ER P1 (23 CCR section 5005) which Respondent repeatedly referred to as its flow policy in its brief. It states, "(a) The State Water Resource Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the revised flow objectives shall be used to determine consistency with the Delta Plan." (AR, B614.)

However, with regard to measurable targets concerning Delta flows, the Delta Plan only set a vague goal of "[p]rogress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary..." (AR, B623.) The Court determined "progress" does not provide a quantified or otherwise measurable target upon which Delta users can gauge compliance. This "progress" language was found in ER R1, a recommendation identified as an outcome performance measure.

As the Court has provided above, quantified or otherwise measurable targets must be part of a legally enforceable plan. Accordingly, the Court believes the wording in the ruling is accurate, and sufficient to convey the Court's intent that Respondent must comply with its obligation to create a legally enforceable Delta Plan that includes the section 85308 components. The Court does not opine whether Respondent should revise section 5005, instead finding that the Delta Plan fails to contain legally enforceable measurable targets concerning Delta Flows as required by section 85308.

3. Respondent's third inquiry provides, "[t]he language calling upon the Council 'to revise the Delta Plan *and any applicable regulations* to...Promote options for water conveyance and storage systems' can be misinterpreted. (See Ruling, pp. 38 and 72 [emphasis added].) This motion seeks clarification that the Court is not requiring the Council to promote options with regulations, as opposed to with a non-regulatory Delta Plan revision."

The Delta Reform Act requires the Delta Plan to "*promote options* for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals." (§ 85320.) The parties argue whether this means Respondent must adopt regulations or recommendations to achieve the section 85320 requirements. The Court finds that the language "promote options" does not implicate a regulatory requirement, and so the Court leaves it to Respondent's discretion whether to "promote options" by regulation or recommendation.

State and Federal Water Contractors' Motion for Clarification

The Court acknowledges that it improperly referred to this matter as having been bifurcated. Indeed, by minute order dated May 21, 2014, the Court *denied* the motion for bifurcation, finding "issues arising under the Delta Reform Act and issues arising under CEQA are sufficiently intertwined that a formal order of bifurcation would not be feasible and would not significantly improve the manageability of this

case or contribute to judicial economy and efficiency." The Court indicated that from a review of the parties' briefing, it would "determine whether a phased approach involving more than one hearing is appropriate for case management purposes and will schedule the hearing or hearings accordingly. Given the scope and number of issues in this case, the parties should anticipate the possibility of multiple hearings."

The Court strikes all references to "bifurcated" from the Ruling on Submitted Matter. Further, the title of the ruling is modified to read, "RULING ON SUBMITTED MATTER: PETITIONS FOR WRIT OF MANDATE."

However, in light of the Court's finding of statutory violations and its finding that the Delta Plan is invalid, there is no longer a project with an EIR for which to conduct a CEQA analysis and review. Accordingly, the Court provided that the CEQA matters were moot, by which the Court implied, without expressly ordering, that there is no project, and consequently no EIR to currently review. The Court acknowledges that the ruling was unclear, and left the parties to guess as to the status of the Delta Plan and CEQA issues.

To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed. As Respondent itself argued previously, in light of an invalid Delta Plan, there is no proposed project, and consequently nothing before the Court to review under CEQA. The Court does not believe that piece-meal CEQA review is feasible under circumstances in which significant Plan revisions are required.

Because Respondent must comply with its CEQA obligations following completion of a revised Delta Plan, Petitioners will have the opportunity to file CEQA challenges to this new certified document. Consequently, no party is deprived of the opportunity to present challenges to the EIR at such time as a final project (Delta Plan) has been properly approved.

With regard to a request for a determination of prevailing party status and cost apportionment, these issues are premature. Once the Court enters its final order, and issues judgments, the parties may submit whatever motions they deem appropriate concerning costs and litigation expenses, and prevailing party status. The Court declines to rule on the issue of prevailing party status via a motion for clarification.

The City of Stockton's Motion for Clarification

The Court acknowledges that it improperly referred to this matter as having been bifurcated. Indeed, by minute order dated May 21, 2014, the Court *denied* the motion for bifurcation, finding "issues arising under the Delta Reform Act and issues arising under CEQA are sufficiently intertwined that a formal order of bifurcation would not be feasible and would not significantly improve the manageability of this case or contribute to judicial economy and efficiency." The Court indicated that from a review of the parties' briefing, it would "determine whether a phased approach involving more than one hearing is appropriate for case management purposes and will schedule the hearing or hearings accordingly. Given the scope and number of issues in this case, the parties should anticipate the possibility of multiple hearings."

The Court strikes all references to "bifurcated" from the Ruling on Submitted Matter. Further, the title of the ruling is modified to read, "RULING ON SUBMITTED MATTER: PETITIONS FOR WRIT OF MANDATE."

However, in light of the Court's finding of statutory violations and its finding that the Delta Plan is invalid, there is no longer a project with an EIR for which to conduct a CEQA analysis and review. Accordingly,

the Court provided that the CEQA matters were moot, by which the Court implied, without expressly ordering, that there is no project, and consequently no EIR to currently review. The Court acknowledges that the ruling was unclear, and left the parties to guess as to the status of the Delta Plan and CEQA issues.

To be clear, the Delta Plan is invalid and must be set aside until proper revisions are completed. As Respondent itself argued previously, in light of an invalid Delta Plan, there is no proposed project, and consequently nothing before the Court to review under CEQA. The Court does not believe that piece-meal CEQA review is feasible under circumstances in which significant Plan revisions are required.

Because Respondent must comply with its CEQA obligations following completion of a revised Delta Plan, Petitioners will have the opportunity to file CEQA challenges to this new certified document. Consequently, no party is deprived of the opportunity to present challenges to the EIR at such time as a final project (Delta Plan) has been properly approved.

With regard to the City of Stockton's arguments that it was a prevailing party with regard to "the Plan's failure to provide quantified or other [sic] measurable targets to restore natural flows," the Court has reviewed the arguments on pages 27:21-28:14 of City of Stockton's brief (as the City of Stockton claims these pages represent its raising of the issue, and the basis for its argument that the Court failed to properly address these statutory arguments.).

Pages 27 and 28 appear within the City of Stockton's challenges that "the EIR failed to evaluate information about future natural flow regimes." The argument is that "Petitioner expressly commented that the EIR omitted relevant data and information by failing 'to identify the potential environment risks associated with requiring the various water and flood control projects to operate in such a way as to provide a more natural flow regime.'" (Opening Brief, pp. 27:26-28:2.) The language City of Stockton refers to from its petition is identical.

This language does not raise the argument that the Delta Plan fails to include "quantified or otherwise measurable targets" concerning Delta flows. It instead argues the EIR failed to adequately evaluate the effects of a more natural flow regime. The statement that the "City incorporates by reference the analysis and arguments presented by other Petitioners on this issue" limits such incorporation to arguments concerning this specific issue, not arguments concerning quantified or otherwise measurable targets.

The City of Stockton also argues that the Court's proceedings were unfair in that the City of Stockton relied on being able to present its CEQA case subsequent to oral arguments on the statutory challenges. While the Court acknowledges the City of Stockton's CEQA challenges will be delayed, the Court has discussed above the necessity for such a delay. Furthermore, a review of the City of Stockton's written pleadings and its oral presentation does not indicate that the City of Stockton withheld oral argument concerning statutory issues in anticipation of the CEQA hearings.

CONCLUSION

The Delta Plan is invalid and must be set aside pending revisions. In light of this finding, there is nothing currently before the Court to review under CEQA. As provided in the introduction to this ruling, in ascertaining the Court's final ruling, the Ruling on Submitted Matter should be read in conjunction with this ruling on the Motions for Clarification. No further ruling will be issued on the merits.

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In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule

1.06, counsel are directed to meet and confer as to who will prepare the order; the order shall be prepared attaching this ruling as an exhibit and submitted to all parties for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submitted to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted.

The Court AFFIRMS the tentative ruling with the following modification:

The following stipulation of the parties shall be included in the judgment:

The judgment shall reflect as stipulated by the parties the Court has not resolved any of the party's claims pursuant to Public Resources Code section 21000, et seq, CEQA stated in the pleadings in this action.

As stipulated by the parties all existing CEQA claims are preserved regardless of the outcome of any appeals of this judgment.

As stipulated by the parties any defenses arising out of this judgment, including but not limited to: Statute of limitations, laches, exhaustion of administrative remedies and estoppel, shall not apply to the Petitioners re-pleading or resurrection of their existing CEQA claims at a later date.

The following are not part of the parties' stipulation but the parties do agree they should be part of the judgment.

To the extent the Council relies on the 2013 program EIR, in the future the Council shall as part of that reliance adopt new CEQA findings and re-certify the 2013 program EIR along with taking action on any other CEQA documentation it deems appropriate.

The Council shall also file a CEQA notice of determination that reflects the full extent of this reliance.

Charity B. Schiller, counsel for Petitioners/Plaintiffs and Interveners State Water Contractors, Alameda County Flood Control and Water Conservation District, Zone 7, and San Bernardino Valley Municipal Water District is ordered to prepare a formal order, submit to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit to the Court for signature in accordance with Rule of Court 3.1312(b).